FILED

05-640 SEP 15 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LARRY G. BELLUM,
Petitioner,

v.

PCE CONSTRUCTORS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

C. ERIC MALOUF
Counsel of Record
MICHAEL J. MALOUF, JR.

MALOUF & MALOUF
501 E. CAPITOL STREET
JACKSON, MS 39201
(601) 948-4320
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the Court of Appeals Erred in Applying Regulation 29 C.F.R. § 825.111(b) as It Is Directly Contrary to the Intent of Congress and Reduces the Coverage of the Family and Medical Leave Act as Congress Intended?

II. Whether the Court of Appeals Erred in Applying Regulation 29 C.F.R. § 825.111(b) as the Secretary of Labor Was Not Authorized to Alter the Statutory Framework of the Family and Medical Leave Act?

PARTIES TO THE PROCEEDING

Petitioner

Larry G. Bellum
1647 David Allen Road
Greensburg, Louisiana 70441

Respondent

PCE Constructors, Inc.
Bob Robards, President and Owner
11328 Pennywood Avenue
Baton Rouge, Louisiana
1060 Frank Oakes Road
Fernwood, Mississippi

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Relevant Provisions	1
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	14
Appendix	
Fifth Circuit Decision	App.1
Order Denying Rehearing	App.14

TABLE OF AUTHORITIES

CASES	PAGE
Bliss v. Jennifer Convertibles, Inc., 2003 WL 22239655 (N.D.Ill. 2003)	13
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694(1984)	3
Collinsworth v. Earthlink/Onemain, Inc., 2003 WL 22916461 (D.Kan. 2003)	13
Cousin v. Sofono, Inc., 238 F.Supp.2d 357 (D.Mass. 2003)	12
Dinkins v. Varsity Contractors, Inc., 2005 WL 599979 (N.D. Ill. 2005)	12
Domnick v. Ver Halen, Inc., 2003 WL 23095738 (W.D.Wis. 2003)	13
Figueira v. Black Entertainment Television, Inc., 944 F.Supp. 299 (S.D.N.Y. 1996)	12
Fauntleroy v. Rainbow Marketers, 888 So.2d 1045 (La. App. 2004)	11
Gazda v. Pioneer Chlor Alkali Co., Inc., 10 F.Supp.2d 656 (S.D.Tex. 1997)	12
General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 600, 124 S. Ct. 1236, 1248 (2004)	4

Gonzalez-Wiley v. Tessa Complete Health Care, Inc., et al., 2002 WL 985564 (D.Or. 2002)..... 13

Grimsley v. Fiesta Salons, Inc., 2003 WL 117985 (E.D.Mich. 2003)..... 12

Harbert v. Healthcare Services Group, Inc., 391 F.3d 1140, 1147 (10th Cir. 2004)..... 4,11

Harbert v. Healthcare Services Group, Inc., 173 F.Supp.2d 1101 (D.Colo. 2001)..... 12

Harvell v. North Carolina Ass'n of Educators, Inc., 510 S.E.2d 403 (N.C.App. 1999)..... 12

INS v. Cardoza-Fonseca, 480 U.S. 421, 446-448, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)..... 4

Knight v. Industrial Distribution Group, Inc., 2004 WL 2300477 (D. N.H. 2004)..... 12

Lincoln v. Sears, Roebuck and Co., 2002 WL 31108204 (D.Minn. 2002)..... 13

Mohasco Corp. v. Silver, 447 U.S. 807, 818-819, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980)... 9

Moreau v. Air France, 343 F.3d 1179 (9th Cir. Cal. 2003)..... 11

Morrison v. Magic Carpet Aviation, 383 F.3d 1253 (11th Cir. Fla. 2004)..... 11

Nedzvekas v. LTV Copperweld, 356 F.Supp. 2d (N.D. Ill. 2005)..... 11

Nordquist v. City Fin. Co., 173 F.Supp. 2d 537 (N.D.Miss. 2001)..... 12

Paleologos v. Rehab Consultants, Inc., 990 F.Supp. 1460 (N.D.Ga. 1998)..... 12

Ragsdale v. Wolverine World Wide, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002)..... 8,9

Rich v. Delta Air Lines, Inc., 921 F.Supp. 767 (N.D.Ga. 1996)..... 12

Rollins v. Wilson County Government, 967 F.Supp. 990 (M.D.Tenn. 1997)..... 12

Smallberger v. Federal Realty Investment Trust, 1999 WL 126919 (E.D.Pa. 1999)..... 13

Smith v. University of Chicago Hospitals, 2003 WL 22757754 (N.D.Ill. 2003)..... 12

Sprow v. Hartford Ins. Co., 594 F.2d 412 (5th Cir. 1979)..... 11

Sylvester v. Dead River Co., 260 F.Supp.2d 181 (D.Me. 2003)..... 12

Thomas v. Pearle Vision, Inc., 251 F.3d 1132 (7th Cir. Ill. 2001)..... 11

OTHER AUTHORITIES

29 C.F.R. §§ 11..... 2

60 F.R. 2180, 2187 (1995)..... 13

House Report No. 101-28(I)..... 7
House Report No. 102-135(I)..... 7
House Report No. 103-8(I)..... 7,10

Public Law 103-3, Senate Report No. 103-3..... 5,6
Senate Report No. 102-68..... 7

OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005). (See also Appendix pp 1-13). The Fifth Circuit denied Bellum's petition for rehearing without opinion.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on April 25, 2005. On June 3, 2005, the Fifth Circuit denied Bellum's Petition for Rehearing En Banc. (See Appendix pp 14-15)

RELEVANT PROVISIONS

This case involves a civil action arising under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. and FMLA regulation 29 C.F.R. §825.111(b). The Fifth Circuit's opinion in this matter has national implications as it addresses an issue of first impression nationally on the FMLA and reduces the coverage of the FMLA as contemplated by Congress.

STATEMENT OF THE CASE

The District Court and Fifth Circuit Court of Appeals correctly found and the parties agree that Mr. Bellum was an "eligible employee." Mr. Bellum had been employed by PCE for more than 12 months and had worked for more than 1250 hours in the previous 12-month period. The District Court and Fifth Circuit also correctly found that the aggregate number of employees at PCE's work sites in Fernwood and Baton Rouge exceeded 50 employees and that the two work sites are less than 75 miles apart when the distance is measured by radius or as the crow flies, but are greater than 75 miles apart when the distance is measured in surface or road miles. Despite the clear intent of Congress that the distance should be measured by "radius" and this Court's ruling in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002), the District Court and Fifth Circuit applied 29 C.F.R. §825.111(b) which states that the 75-mile distance should be measured by surface miles, using surface transportation over public streets, roads, highways and waterways. Said regulation reduces the coverage contemplated by Congress in each and every FMLA case involving the aggregation of employees at different work sites within 75 miles.

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C.§ 1331 (federal question) as this case involves a civil action arising under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. The supplemental jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1367 and principles of pendent jurisdiction.

On April 5, 2004, the District Court for the Southern District of Mississippi, Jackson Division, entered a Final Judgment dismissing this entire case with prejudice. The judgment was a final decision of the District Court, and the

jurisdiction of the Fifth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

1. Regulation 29 C.F.R. § 825.111(b) and the Fifth Circuit's Decision Conflict with the Clear Intent of Congress

Despite the clear mandate of the United States Supreme Court and the clear intent of Congress to use "radius" to measure the 75-mile distance in determining FMLA coverage, the Fifth Circuit and District Court have failed and/or refused to follow same. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), this Court held:

> **First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.** *Chevron*, at 842-3. (emphasis added)

The Court further held:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. (citations omitted) . . . If a court, employing traditional tools of

> statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Id.* n. 9.

Similarly, in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600, 124 S. Ct. 1236, 1248 (2004), this Court held:

> Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for **only** when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent. (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-448, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) citing *Chevron*). Here, regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA.

In *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004), the Tenth Circuit Court of Appeals, citing this Court's opinion in *Gen. Dynamics Land Sys.*, at 1248-49, held:

> To ascertain whether Congress had an intent on the precise question at issue, courts should "employ traditional tools of statutory construction." These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes. Also see, the Fifth Circuit's Opinion herein at App. 6.
>
> Congress' intent to use "radius" as the measure of

distance between work sites is clearly expressed throughout the legislative history of the Family and Medical Leave Act. In Public Law 103-3, Senate Report No. 103-3, dated January 27, 1993, the following can be found:

Under "Summary of the Bill," it states:

> Title I of S. 5, the Family and Medical Leave Act of 1993, makes available to eligible employees up to 12 weeks of unpaid leave per year under particular circumstances that are critical to the life of a family. . .
>
> The act exempts small businesses and limits coverage of private employers to employers who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. To be eligible for leave, an employee of a covered employer must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the 12-month period proceeding the commencement of the leave. The employer must, in addition, employ at least 50 people within a 75-mile **radius** of the employee's work site. P.L. 103-3, page 4; S. REP. No. 103-3, pages 1-2. (emphasis added)

Under "Definitions," it states:

> The term "eligible employee" is further defined in section 101(2)(B) to exclude any employee employed at a worksite with less than 50 employees if the total number of employees employed by the employer within 75 miles of

> the worksite is less than 50. In aggregating the number of employees at the worksite and within the 75 mile **radius**, all employees of the employer, not just eligible employees, are to be counted. P.L. 103-3, page 25; S. REP. No. 103-3, page 23. (emphasis added)

Under "Regulatory Impact Statement," it states:

> S. 5 would regulate every private and public sector employer with 50 or more employees within a 75-mile **radius**. This number is estimated as approximately 293,000 establishments. Employees who have worked at least one year and 1250 hours for that employer would be eligible for leave under the Act. This number is estimated as approximately 44 million employees. Those not regulated would be all employers with fewer than 50 employees. P.L. 103-3, page 44; S. REP. No. 103-3, page 42. (emphasis added)

Under "Section-By-Section Analysis," it states:

> Section 101. Definitions
>
> . . . .
>
> Eligible employee-means any employee as defined in section 3(e) of the FLSA who is employed by the employer with respect to whom benefits are sought for not less than 12 months and not less than 1250 hours over the previous 12 month period, except that such term does not include Federal officers or employees covered under Title II of the Act.

> Employer-means any person engaged in commerce who employs 50 or more employees within a 75-mile **radius** during 20 or more calendar weeks in the current or preceding calendar year; any successor in interest of an employer; and any public agency defined under section 3(x) of the FLSA. P.L. 103-3, page 45; S. REP. No. 103-3, page 43. (emphasis added)

Every piece of legislative history drafted on the FMLA has included "radius" as the measure of distance between work sites. See Senate Report No. 103-3, January 27, 1993, pages 1-2, 23, 42, 43; Senate Report No. 102-68, May 30, 1991, pages 58, 59-60; House Report No. 103-8(I), February 2, 1993, page 35; House Report No. 102-135(I), June 27, 1991, page 37; House Report No. 101-28(I), Apr. 13, 1989, page 24. In fact, the 1993 and final Senate Report includes the term "radius" as the unit of measure more than any other report. The cost projections, estimates, and impact statements done by the General Accounting Office and the Congressional Budget Office have used "radius" as the measure of distance between work sites. Congressional intent is clear and unambiguous, and the District Court and the Fifth Circuit should have struck down 29 C.F.R. §825.111(b).[1]

---

[1]The Fifth Circuit fails to acknowledge the legislative history cited by Mr. Bellum and squarely on point, yet cites indirect legislative history which is clearly contrary to Congress' intent to use "radius" as the measure of distance. (See App. 7 citing the 1991 FMLA House Report)

2. The Fifth Circuit's Opinion Allows an Impermissible and Unauthorized Regulation to Stand

Secondly, under the second prong of the *Chevron*, the regulation cannot stand if it is not a permissible construction of the statute. As addressed above, Congressional intent could not be any clearer. The measure of distance between work sites is "radius." The regulation is not a permissible construction of the statute as it is manifestly contrary to the statutory framework of the act.

Also, as reiterated by the United States Supreme Court in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002), the Secretary of Labor was granted limited authority to prescribe regulations concerning the FMLA. The authority granted to the Secretary of Labor did not include the right to alter the coverage of the leave entitlement provided by Congress. In *Ragsdale*, at 96, this Court held that no further analysis was needed because the FMLA regulation [in that case §825.700(a)]:

> effects an impermissible alteration of the statutory framework and cannot be within the Secretary's power to issue regulations "necessary to carry out" the Act under § 2654. In so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute. Whatever the bounds of the Secretary's discretion on this matter, they were exceeded here.

Pursuant to 29 U.S.C.S. § 2654, the Secretary of Labor was only granted authority to "prescribe such regulations as are necessary to carry out" the Act. In the case at hand, the

Secretary of Labor has again exceeded the authority granted to it by Congress by reducing the coverage of the FMLA. The regulation should be struck down just as this Court struck down the FMLA regulation in *Ragsdale*.

3. The Reasoning for the Fifth Circuit Opinion is Flawed and Fails to Apply Existing Law

The "geographic limitation of a 75-mile radius that applies to the aggregation of employees at different facilities" as it was called in the 1989 and 1991 House Reports (at pages 24 and 37 respectively) was the result of years of negotiating by Congress. As similarly addressed in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 93-94 (2002), agencies must respect the compromises made by Congress:

> Like any key term in an important piece of legislation, the 12-week [FMLA leave] figure was the result of compromise between groups with marked but divergent interests in the contested provision. Employers wanted fewer weeks; employees wanted more. See H. R. Rep. No. 102-135, pt. 1, p. 37 (1991). Congress resolved the conflict by choosing a middle ground, a period considered long enough to serve "the needs of families" but not so long that it would upset "the legitimate interests of employers." § 2601(b).
>
> Courts and agencies must respect and give effect to these sorts of compromises. (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-819, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980).

Members of Congress also battled and negotiated over the number of employees required to meet the small employer exception which was increased to 50 and the number of hours an employee had to work in the preceding 12 month period in order to be eligible for the entitlement which was increased to 1,250. House Report No. 103-8(I), February 2, 1993, pages 20-21. The geographic limitation for the aggregation of employees is a significant designation, and Congress clearly chose "radius" as the method to measure distance within 75 miles. This decision must be respected and applied.

In the Fifth Circuit's opinion on App. 6, the Court suggests a hypothetical which is flawed and focuses on potential inconvenience for a hypothetical company. First, no rational company would build a work site 25 miles away which could be reached only by traveling 120 miles without knowing that inconvenience would follow for all business purposes including labor. Second, there is no requirement that any employee travel between work sites to replace a worker on leave. As in most cases, work is reallocated among local employees and/or a temporary worker is hired to fill in the gaps. Likewise, in the case at hand, no employee traveled between work sites when Mr. Bellum took leave. Despite being entitled to return to his position of employment or a similar position, Mr. Bellum was replaced by a former employee.

Furthermore, the regulation lacks uniformity and simplicity and further, is arbitrary to the extent that it allows the use of "radius" only if no surface method is available instead of exempting such an employer. It is quite a undertaking to travel every country road and highway in a 75 mile radius looking for a road trail of 75 miles or less. In fact, the Fifth Circuit acknowledges that in an earlier unrelated opinion that the Fifth Circuit "specifically rejected the use of road miles because that standard lacks uniformity and simplicity." *See* App. 10, n. 7

(citing *Sprow v. Hartford Ins. Co.*, 594 F.2d 412 (5th Cir. 1979)). In *Sprow*, the Fifth Circuit addressed the question as to which method a court applies in measuring distance under Rule 4 of the Federal Rules of Civil Procedure. Rule 4 states that service is effective to establish jurisdiction if the person is served "within 100 miles" from the courthouse where the summons issues. Rule 4 is silent as to the method to the measure distance and does not state "radius" or "road miles." The Court held that the "simplest and most proper method is the straight lines (sic) or 'as the crow flies' measure of air miles." *Sprow*, at 417. The Court also held that radius is a "uniform standard, offering more certainty than a measure based on road miles, which will continually fluctuate as new and different routes are constructed." *Id.*

As previously stated by Mr. Bellum, this matter involves a case of first impression nationally on the FMLA. Though no case can be found directly addressing the issue of "radius" versus "road miles" as the method to measure distance between work sites, it is important to note that more than twenty Courts around the United States consistently used "radius" as the measure of distance. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1149-50 (10th Cir. Colo. 2004)(quoting House Report No. 102-135(I), at 37 (1991) "there is a geographic limitation of a 75-mile **radius** that applies to the aggregation of employees at different facilities."); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253 (11th Cir. Fla. 2004) ("in order for statute [FMLA] to apply, the employer(s) at issue must have at least 50 employees within a 75 mile **radius** of the work site."); *Moreau v. Air France*, 343 F.3d 1179 (9th Cir. Cal. 2003); *Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132 (7th Cir. Ill. 2001); *Nedzvekas v. LTV Copperweld*, 356 F.Supp. 2d (N.D. Ill. 2005); *Fauntleroy v. Rainbow Marketers*, 888 So.2d 1045 (La. App. 2004);

Nordquist v. City Finance Co., 173 F.Supp.2d 537 (N.D.Miss. 2001)(holding that plaintiff was not eligible for FMLA leave because there were less than 50 employees within a seventy-five mile **radius**); *Sylvester v. Dead River Co.*, 260 F.Supp.2d 181, 186 (D.Me. 2003)(stating in fn7 that the record does not contain number of employees within a seventy-five mile **radius** of work site)(citing §2611(2)(B)(ii)); *Paleologos v. Rehab Consultants, Inc.*, 990 F.Supp. 1460 (N.D.Ga. 1998) (holding that plaintiff must demonstrate that employer employed at least 50 employees within a 75-mile **radius**); *Rollins v. Wilson County Government*, 967 F.Supp. 990 (M.D.Tenn. 1997)(holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile **radius**); *Figueira v. Black Entertainment Television, Inc.*, 944 F.Supp. 299 (S.D.N.Y. 1996)(holding that an "eligible employee" must work for employer with 50 employees within a 75-mile **radius**); *Rich v. Delta Air Lines, Inc.*, 921 F.Supp. 767 (N.D.Ga. 1996)(holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile **radius**); *Cousin v. Sofono, Inc.*, 238 F.Supp.2d 357 (D.Mass. 2003); *Harbert v. Healthcare Services Group, Inc.*, 173 F.Supp.2d 1101 (D.Colo. 2001); *Gazda v. Pioneer Chlor Alkali Co., Inc.*, 10 F.Supp.2d 656 (S.D.Tex. 1997); *Harvell v. North Carolina Ass'n of Educators, Inc.*, 510 S.E.2d 403 (N.C.App. 1999); *Smith v. University of Chicago Hospitals*, 2003 WL 22757754 (N.D.Ill. 2003)(holding "the FMLA only applies to employers with fifty or more employees within a seventy-five mile **radius**."); *Dinkins v. Varsity Contractors, Inc.*, 2005 WL 599979 (N.D. Ill. 2005); *Knight v. Industrial Distribution Group, Inc.*, 2004 WL 2300477 (D. N.H. 2004); *Grimsley v. Fiesta Salons, Inc.*, 2003 WL 117985 (E.D.Mich. 2003) (holding "the Court finds that the defendant employed less than 50 employees within a 75-mile **radius** during the relevant time period, and the plaintiff was therefore not eligible to claim

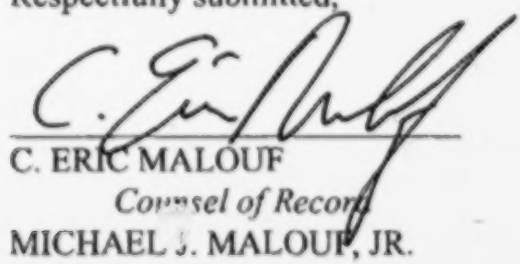
FMLA leave."); *Lincoln v. Sears, Roebuck and Co.*, 2002 WL 31108204 (D.Minn. 2002)(defendant argued that there were not 50 employees within a 75-mile **radius**); *Smallberger v. Federal Realty Investment Trust*, 1999 WL 126919 (E.D.Pa. 1999)(defendant argued that there were not 50 employees within a 75-mile **radius**); *Domnick v. Ver Halen, Inc.*, 2003 WL 23095738 (W.D.Wis. 2003); *Collinsworth v. Earthlink/Onemain, Inc.*, 2003 WL 22916461 (D.Kan. 2003); *Bliss v. Jennifer Convertibles, Inc.*, 2003 WL 22239655 (N.D.Ill. 2003); *Gonzalez-Wiley v. Tessa Complete Health Care, Inc., et al.*, 2002 WL 985564 (D.Or. 2002). Excluding the District Court and Fifth Circuit in the case at hand, not a single FMLA opinion has mentioned "surface" or "road" miles.

Furthermore, it is evident that the Secretary of Labor knew the correct measure of distance to be "radius" but acted on its own to reduce the coverage of the FMLA, contrary to the intent of Congress. In the preamble to the regulation in question, the Department of Labor acknowledged that its own regulations were written to include the term "radius" until it revised said regulations upon the request of a lobbyist group. 60 F.R. 2180, 2187 (1995).

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,



C. ERIC MALOUF
Counsel of Record
MICHAEL J. MALOUF, JR.
MALOUF & MALOUF
501 E. CAPITOL STREET
JACKSON, MS 39201
(601) 948-4320

Attorneys for Petitioner

Date: September 15, 2005

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60409

LARRY G. BELLUM,

Plaintiff-Appellant,

versus

PCE CONSTRUCTORS INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

Before GARWOOD, JONES and STEWART, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant Larry G. Bellum appeals the decision of the district court granting summary judgment to defendant-appellee PCE Constructors, Inc. (PCE) on Bellum's federal claim under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., and on his pendent Mississippi law claims for both the intentional and negligent infliction of emotional distress. We affirm.

Facts and Proceedings Below

PCE is in the construction industry and does work

primarily on a project-by-project basis.[1] Its principal place of business is Baton Rouge, Louisiana, though it takes on projects across several southern states. During the time giving rise to the events in this case, PCE was building a facility for Fabricated Pipe, Inc (FPI) in Fernwood, Mississippi. PCE was also involved in helping FPI establish its pipe fabrication business.

PCE hired Bellum, who had worked for PCE on a contract-basis before, on December 12, 1999 to manage a particular project at the FPI site in Fernwood. PCE had a staff of 14 at its headquarters in Baton Rouge and 41 at the FPI site. Bellum testified in his deposition that he drove each day between his home in Baton Rouge and Fernwood, a round-trip of about 190 miles. The distance between PCE's headquarters and FPI is between 66.5 and 69.5 linear miles but 88.5 miles over public roadways.[2]

---

[1] PCE argued in the district court that it is not a proper party under Rule 17 of the Federal Rules of Civil Procedure because it is not the successor to Constructors, Inc., which actually employed Bellum during the relevant period. The district court noted in its summary judgment order that it did not find it necessary to reach this issue in resolving the case in PCE's favor. In its brief before us, PCE noted that it was not going to address the proper party argument but asks us not to construe this as a waiver of the objection. Like the district court, we too are able to resolve the questions before us in PCE's favor, so the proper party issue is moot. Accordingly, for the purposes of appeal, we assume, *arguendo*, that PCE was Bellum's employer, and hence refer to it as such.

[2] In his memorandum in opposition to summary judgment, Bellum submitted several exhibits measuring the

On December 24, 2000, Bellum told his supervisor, Charles Gibson, that he was taking leave from work to have open-heart surgery. Bellum's last day was December 26, 2000. Bellum contends that while he was on leave for his heart surgery, Gibson repeatedly told both him and his wife that a job was waiting for him at the FPI site. Following his recovery from heart surgery, Bellum visited the FPI site on March 1, 2001 to investigate returning to work. Gibson apparently told him there was no longer any work for him because Bellum's project was completed in his absence. The two remained in touch over the next two weeks discussing work possibilities, but Bellum was formally terminated on March 16, 2001 without ever having returned to work.

On March 3, 2003, Bellum filed the instant suit in the district court seeking relief under the FMLA and for state law claims of emotional distress. On April 5, 2004, the district court granted summary judgment to PCE on the ground that Bellum was not an "eligible employee" under the FMLA. The district court also concluded that, absent a duty under the FMLA to rehire Bellum, PCE was free not to rehire him because Mississippi is an employment at-will state. It follows

---

linear distance by various scientific methods. PCE stated that it calculated the distance over public roads using the popular website www.mapquest.com. In his brief on appeal, Bellum argues that the driving distance between PCE's headquarters and the FPI worksite is greater than 75 miles but less than 80. We presume that Bellum is measuring the shortest possible distance over public roads whereas PCE is measuring the distance using the interstate high ways. In any case, Bellum does not dispute that the shortest possible distance over the public roadways exceeds 75 miles.

from this, the district court reasoned, that Bellum could not succeed on his claim that he suffered actionable emotional distress when PCE chose not to rehire him. It is from this disposition that Bellum now appeals.

Discussion

A. Standard of Review

We review a grant of summary judgment under the same standard applied by the district court. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 319 (5th Cir. 2003). We examine questions of law *de novo* and construe disputed material facts in favor of the non-movant. *Id.*

B. The FMLA

The FMLA provides, inter alia, an "eligible employee" with "a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition[.]" 29 U.S.C. § 2612(a)(1)(D). The parties do not dispute that Bellum's heart problems qualify as a "serious health condition." What they do dispute, however, is whether Bellum is an "eligible employee." PCE maintains that Bellum falls within one of two enumerated exceptions to the definition of eligible employee:

> "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by the employer within 75 miles of that worksite is less than 50."

29 U.S.C. § 2611(2)(B)(ii). This exception applies, PCE contends, because its headquarters, as measured over public

roads, is more than seventy-five miles from the FPI worksite.[3] Bellum counters that the exception does not apply because the linear distance, i.e. "as the crow flies," between FPI and the Baton Rouge headquarters is less than 70 miles.

The district court resolved this controversy by consulting 29 C.F.R. § 825.111(b), which states that the "75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed." The regulation goes on to provide that the 75-mile distance should only be measured as the crow flies when there is no "available surface transportation between worksites." *Id.*[4] The district court granted summary judgment to PCE because, under the method of measurement set forth in the regulation, Bellum was not an FMLA-eligible employee. Because the FMLA speaks simply of miles, not "surface miles," Bellum urges us to strike down 29 C.F.R. § 825.111(b) as manifestly contrary to the plain language of 29 U.S.C. § 2611(2)(B)(ii).

We review federal regulations of the sort at issue here under the familiar Chevron doctrine. If a statute is unambiguous, then the statute prevails over an inconsistent regulation. *Chevron U.S.A., Inc. v. Natural Resources Defense*

---

[3] The parties do not dispute that PCE employed fewer than 50 employees at the FPI worksite but more than 50 at the FPI site and the Baton Rouge headquarters combined.

[4] 29 U.S.C. § 2654 provides that "The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I [29 U.S.C. §§ 2611-2619] of this chapter and this subchapter [29 U.S.C. §§ 2651-2654] . . .".

Council, Inc., 104 S. Ct. 2778, 2781 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (citations omitted). To ascertain whether the statute has spoken unambiguously to the question at issue, we avail ourselves of the traditional means of statutory interpretation, which include, *see, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1248-1249 (2004), the text itself, its history, and its purpose. While the 75-mile distance set forth in the statute is not inherently ambiguous, we disagree with Bellum that the failure of Congress to stipulate a method of measuring that distance implies that it should be measured as the crow flies. To measure in linear terms as Bellum suggests would regularly conduce to absurd results and no canon of statutory construction requires us to honor plain language when to do so would frustrate the unmistakable purpose of the law. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947 (2000) (stating that "when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd–is to enforce it according to its terms.") (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989) (in turn quoting *Caminetti v. United States*, 37 S. Ct. 194 (1917)); *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1150-1151 (10th Cir. 2004) (stating, as one of its reasons for striking down an FLMA regulation, that no deference is owed to an interpretation of the statute that makes arbitrary distinctions).

The error in Bellum's approach may be illustrated as follows. Suppose that Company A had its headquarters along the south rim of the Grand Canyon and a branch office on the other side only 25 miles away as the crow flies. Suppose further, quite plausibly, that the shortest distance between the two by public roads is 120 miles. Now, imagine that Company

B has its headquarters next to a straight-line interstate highway and a branch office 80 miles away also right along the interstate. Under Bellum's reading of the statute, Company A would be bound by the FMLA but Company B would not be. Given that the purpose of the exception at 29 U.S.C. §2611(2)(B)(ii) is to relieve the burden of FMLA compliance on companies with widely dispersed operations, it would make no sense to construe the statute in a way that subjects Company A but exempts Company B. *See Moreau v. Air France*, 356 F.3d 942, 945 (9th Cir. 2004) (concluding that the purpose of the exception was "to accommodate employer concerns about 'the difficulties that an employer might have in reassigning workers to geographically separate facilities.'") (quoting H.R. Rep. No. 102-135, pt. 1, at 37 (1991))); 29 U.S.C. 2601(b) (1) & (3) ("It is the purpose of this Act to balance the demands of the workplace with the needs of families... in a manner that accommodates the legitimate interests of employers."); *see also Harbert*, 391 F.3d at 1150 (making use of a similar hypothetical to illustrate an arbitrary and capricious interpretation of the FMLA). We conclude, therefore, that the decision of Congress not to define a method of measuring the 75-mile distance constitutes an implicit statutory gap the Secretary of Labor is authorized to fill by 29 U.S.C. § 2654 (see note 4, *supra*).[5]

When Congress has left an implicit gap such as this one, the question before us is simply "whether the [regulation] is based on a permissible construction of the statute." *Chevron*, 104 S.Ct. at 2782. In answering this question, we consider only

---

[5]In concluding that Congress was silent on the appropriate method of measuring the 75-mile distance, we also reject Bellum's argument that the Secretary of Labor was without authority to issue 29 C.F.R. § 825.111(b).

whether the regulation is arbitrary, capricious, or manifestly contrary to the FMLA. *Id.* We may not substitute our own preference for a reasonable alternative devised by the Secretary of Labor. *Id.* "The Secretary's judgment that a particular regulation fits within" the statutory framework of the FMLA "must be given considerable weight." *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1160 (2002). This is the essence of what is known as *Chevron* deference.

We hold that 29 C.F.R. § 825.111(b) is entitled to deference.[6] In our view, the regulation recognizes

---

[6]Bellum's reliance on *Ragsdale* is misplaced. In *Ragsdale*, the Supreme Court struck down an FMLA regulation on the ground that it had no basis in the language of the FMLA and, moreover, was fundamentally inconsistent with the remedial nature of the statute. *See, e.g.*, the following from *Ragsdale*:

> "Our deference to the Secretary, however, has important limits: A regulation cannot stand if it is '"arbitrary, capricious, or manifestly contrary to the statute."' *United States v. O'Hagan, supra*, at 673, 117 S.Ct. 2199 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))." (122 S.Ct. at 1160).
>
> . . .
>
> "We need not decide today whether this conclusion [of the regulation] accords with the text and structure of the FMLA, or whether Congress has instead 'spoken to the precise question' of notice, Chevron, supra, at 842,

that the FMLA is concerned with the practical issue of how an employer will be able to staff its business when an employee takes leave. Given that the overwhelming majority of workers in this country use surface transportation to get to work, the regulation implements the statutory scheme in a way that is consistent with the intent of Congress and germane to the challenges employers face in complying with the FMLA. The Secretary's approach has the additional advantage of avoiding

---

> 104 S.Ct. 2778, and so foreclosed the notice regulations. Even assuming the additional notice requirement is valid, the categorical penalty the Secretary imposes for its breach is contrary to the Act's remedial design." (122 S.Ct. at 1161).

In this case, on the other hand, Congress was silent as to the method of measuring the 75-mile distance and the regulation promulgated by the Secretary of Labor advances, rather than impairs, the FMLA's remedial purpose. Nor is the regulation contrary to the design of the statute.

We also reject Bellum's contention that his method of linear measurement has been widely adopted by the federal courts. Bellum bases this assertion on the fact that numerous cases have used the word "radius," which by definition is a straight line from the center of a circle to anywhere along its edge, when discussing the 75-mile distance described by 29 U.S.C. §2611(2)(B) (ii). None of the twenty cases Bellum cites, however, concerned the question at issue here and it is evident that the courts were using the term "radius" in a colloquial, rather than technical, sense.

the sort of absurd result we hypothesized might prevail under Bellum's reading of the statute.[7]

C. Emotional Distress

Bellum also appeals the district court's grant of summary judgment on his pendent state claims for the intentional and negligent infliction of emotional distress.

Bellum's claim under Mississippi common law for the intentional infliction of emotional distress is subject to the one-year statute of limitations set forth at Miss. Code Ann. §15-1-35 (Rev. 1995). *King v. Otasco, Inc.*, 861 F.2d 438, 442 (5th Cir. 1988) (making an Erie "guess" that the intentional

---

[7] Several weeks after oral argument and in response to a question put to counsel by the panel about how distances are measured for the purposes of service of process, Bellum brought to our attention *Sprow v. Hartford Ins. Co.*, 594 F.2d 412 (5th Cir. 1979). In *Sprow*, we concluded that measuring "as the crow flies" is the proper method for measuring the 100-mile distance for service of process under what was then FED. R. CIV. P. 4(f) and is now FED. R. CIV. P. 4(k)(1)(B). 594 F.2d at 417-418. In coming to this conclusion, we specifically rejected the use of road miles because that standard lacks uniformity and simplicity. *Id.* Even assuming arguendo that Rule 4(k)(1)(B) and 29 U.S.C. §2611(2)(B)(ii) are similar enough to warrant comparison, it is not necessary for us to address whether the considerations discussed in *Sprow* would lead to a better rule than the one devised by the Secretary of Labor because, in a *Chevron* case like this, the only question for us is whether the Secretary's construction of the statute is permissible, not the best. Having found that it is permissible, our inquiry is at an end.

infliction of emotional distress falls within the one-year statute of limitations for intentional acts; this "guess" adopted with respect to false arrest by *City of Mound Bayou v. Johnson*, 562 So. 2d 1212, 1218 (Miss. 1990)); *Hervey v. Metlife Gen. Ins. Corp. Agency Sys. of Miss., Inc.*, 154 F. Supp. 2d 909, 914-915 (S.D. Miss. 2001) (surveying relevant federal and state precedent in concluding that the one-year period still applies to the intentional infliction of emotional distress). His cause of action accrued no later than March 16, 2001 when he was terminated as part of a reduction in force at FPI. Bellum did not file his complaint until March 3, 2003, nearly two years later. His claim, therefore, is barred.

Relying on *McCorkle v. McCorkle*, 811 So.2d 258, 263-264 (Miss. App. 2001), Bellum contends that the running of the limitations period was tolled under Mississippi's continuing tort doctrine because the effects of his termination persist into the present. This is without merit and reflects a fundamental misunderstanding of the continuing tort doctrine. Under Mississippi law, acts that take place outside the one-year statute of limitations are actionable if, and only if, they are directly connected to an ongoing pattern of tortious conduct and at least one tortious act occurred within the one-year limitations period. *Id.* at 264. The continuing tort doctrine does not apply when a plaintiff like Bellum simply alleges that "harm reverberates from one wrongful act or omission." *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 149 (Miss. 1998).

We similarly find Bellum's claim for the negligent infliction of emotional distress to be without merit.

Employment in Mississippi is at-will. *Levens v. Campbell*, 733 So.2d 753, 760 (Miss. 1999). The only exceptions to this general rule are for breach of contract or

unlawful intentional acts such as terminating someone on account of his or her race. *Id.* (stating that "absent an employment contract expressly providing to the contrary, an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all, excepting reasons only declared legally impermissible."). Bellum in effect is asking this panel to extend Mississippi common law by developing an exception to the at-will rule based on mere negligence. Furthermore, in every case in which the Mississippi Supreme Court has permitted a plaintiff to recover for the negligent infliction of emotional distress, the defendant has committed some independently wrongful act or breached some other duty imposed by law or by contract. For example, in *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 295 (Miss. 1992), the policyholder prevailed on her breach of contract claim but was not entitled to punitive damages because the insurer did not act intentionally in outright bad-faith. The court nevertheless allowed her to recover for her emotional damages on the theory that it was simply unfair, though not independently tortious, for the insurer to breach the contract but not be held liable for all of the reasonably foreseeable extra-contractual consequences of its conduct such as emotional harms. *See Southwest Miss. Reg'l Med. Ctr. v. Lawrence*, 684 So.2d 1257, 1269 (Miss. 1996) (allowing emotional damages in a successful breach of contract suit); *see also First Nat'l Bank v. Langley*, 314 So.2d 324, 329 (Miss. 1975) (permitting recovery for emotional distress without a physical impact for negligent breach of duty owed by bank to agent of its customer to receive and properly credit customer's funds placed by agent in bank's night depository and to exercise reasonable care in examining depository for missing deposit). Breach of some other duty imposed by law or contract, in other words, has always been shown where the Mississippi Supreme Court has allowed recovery for the mere negligent infliction of emotional distress. Bellum, however, has not established that PCE breached a contract, or breached any

duty imposed on it by law, or unlawfully discriminated against Bellum under the FMLA.[8]

This court will not use its diversity jurisdiction to "expand state law beyond its presently existing boundaries." *Rubinstein v. Collins*, 20 F.3d 160, 172 (5th Cir. 1994). That is solely the prerogative of the courts of Mississippi. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir.) (en banc), cert. denied, 478 U.S. 1022 (1986).

Bellum, therefore, is not entitled to recover under the facts of this case for the negligent infliction of emotional distress.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

---

[8] Indeed, Bellum has not shown that PCE treated him in any manner that can fairly be described as truly extreme and outrageous. On the contrary, the record indicates that Gibson, Bellum's former boss, stayed in touch with Bellum for a few weeks after Bellum was physically able to return to work but there was no work for him at PCE.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-60409

LARRY G. BELLUM,

Plaintiff-Appellant

versus

PCE CONSTRUCTORS INC

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING EN BANC

(Opinion 4/25/05, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, JONES and STEWART, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

signed by Will Garwood
United States Circuit Judge

REHG-6a

2 Supreme Court, U.S.
FILED
05-640 SEP 15 2005
No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LARRY G. BELLUM,
Petitioner,

v.

PCE CONSTRUCTORS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

C. ERIC MALOUF
Counsel of Record
MICHAEL J. MALOUF, JR.

MALOUF & MALOUF
501 E. CAPITOL STREET
JACKSON, MS 39201
(601) 948-4320
Attorneys for Petitioner

TABLE OF CONTENTS

District Court Opinion and Order.....App. 17

District Court Final Judgment.....App. 26

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LARRY G. BELLUM

PLAINTIFF

VS. **CIVIL ACTION NO. 3:03-CV-343BN**

PCE CONSTRUCTORS, INC.

DEFENDANT

OPINION AND ORDER

This cause is before the Court on the following Motions:

1) the Motion for Summary Judgment of Defendant PCE Constructors, Inc. (hereinafter "Constructors"); and

2) the Motion to Strike Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment.

Having considered the Motion for Summary Judgment, the Response, the Rebuttal and all attachments to each, as well as supporting and opposing authority, the Court finds that it is well taken and should be granted. In reaching the conclusions regarding the Motion for Summary Judgment, the additional arguments stated in Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment were inconsequential. Accordingly, the Motion to Strike should be denied as moot.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This cause of action was brought by Plaintiff against his former employer under the Family Medical Leave Act, 29 U.S.C. § 2601 et seq. (hereinafter "FMLA") and under Mississippi tort law. Plaintiff Bellum was employed by Constructors or a Constructors related entity beginning on or about April 27, 1997.[1] During his employment tenure with Constructors, he worked in different towns. At all times relevant to this suit, however, Plaintiff worked at a facility located in Fernwood, Mississippi.

On December 27, 2000, Plaintiff took medical leave from his job with Constructors to undergo heart surgery. On March 1, 2001, Plaintiff was released to return to work. Upon returning to Constructors in expectation of resuming his position of employment, Plaintiff was informed that his job had been

---

[1]Defendant contends that Constructors, Inc., which is not a named Defendant, was actually Plaintiff's employer, rather than the named Defendant PCE Constructors, Inc. Accordingly, one of Defendant's arguments is that summary judgment must be granted pursuant to Rule 17 of the Federal Rules of Civil Procedure because PCE Constructors, Inc. is not a real party in interest. The Court need not address this argument because summary judgment is granted on other grounds. The Court makes mention of this issue to clarify that its reference to "Constructors" herewith should not be interpreted as an indication that Defendant's real party in interest argument has been rejected. The Court simply need not address that particular issue.

terminated. The official date of Plaintiff's employment termination was March 16, 2001.

Contending that he was entitled to return to his position or a comparable employment position, Plaintiff filed the subject suit under the FMLA on March 3, 2003. The Complaint also includes a claim of infliction of emotional distress under Mississippi state law. The subject Motion for Summary Judgment was filed by Constructors on February 17, 2004. The Motion is now ripe for consideration by the Court.

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not,

however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. Id. at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

III. SUMMARY JUDGMENT ANALYSIS

A. FMLA Claim

Constructors asserts several arguments regarding dismissal of Plaintiff's FMLA claim, any one of which, if found to be with merit, would require summary dismissal of the claim. The Court finds herewith that the FMLA claim must be dismissed because Plaintiff falls outside of the definition of an "eligible employee" under FMLA. Therefore, the Court need not consider the remainder of Defendant's summary judgment arguments.

To seek redress under the FMLA, an aggrieved party must fall under the definition of an "eligible employee."

"Eligible employee" is defined in part under 29 U.S.C. § 2611 (2) (A), which states:

> (2) Eligible employee
> (A) In general
> The term "eligible employee" means an employee who has been employed-
> (I) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

The parties agree that Plaintiff meets the requirement of § 2611 (2) (A). However, Constructors contends that under the provisions of § 2611 (2) (B) (ii), Plaintiff is specifically *excluded* from the definition of an "eligible employee." The Court agrees.

> Under § 2611 (2) (B) (ii):
>
> The term "eligible employee" does not include-
> * * * * *
> (ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

In summary, an otherwise "eligible employee" is rendered ineligible if the subject employer employed less than 50 people within 75 miles of the worksite at which the aggrieved employee worked. In issue in this case is whether the 75 mile distance stated in § 2611 (2) (B) (ii) is measured "as the bird flies," as Plaintiff asserts, or "as the road lies," as Constructors asserts.

Plaintiff worked at the Fernwood, Mississippi worksite of Constructors. The Fernwood worksite employed significantly less than 50 people. The parties agree that the closest facility to Fernwood, Mississippi at which Constructors had an employee base was in Baton Rouge, Louisiana.[2] The aggregate number of employees at the Fernwood and Baton Rouge worksites exceeded 50 employees. If the distance from Fernwood to Baton Rouge is measured by road miles, the two facilities are approximately 88.53 miles apart. Memorandum of Law in Support of Defendant's Motion for Summary Judgment, p. 11 n. 4. If the distance between the two cities is measured in a straight line, the two worksites are approximately 65.9 miles apart. Response to Motion for Summary Judgment, Exhibits "I" through "L." Based on these facts, the viability of Plaintiff's FMLA claim hinges upon which of the two methods of measurement the Court must utilize.

The subject issue is squarely addressed in 29 C.F.R. § 825.111 (b), which states:

> *The 75-mile distance is measured by surface miles, using surface transportation over public streets,* roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g., airline miles).

---

[2]The parties do not contest the fact that the Baton Rouge facility is the only facility at which Constructors had employees, which was arguably within 75 miles of Fernwood.

(Emphasis added). Based on the clear and unequivocal language of 29 C.F.R. § 825.111 (b), this Court must adopt the measurement calculation proposed by Constructors; i.e., the distance between Fernwood and Baton Rouge as measured by road miles. That distance is greater than 75 miles. The Court therefore finds that Plaintiff is excluded from the definition of a "covered employee" under the provisions of 29 U.S.C. § 2611 (2) (B) (ii). Accordingly, Plaintiff's claim under the FMLA must be dismissed.

B. Infliction of Emotional Distress Claim

In the absence of a viable FMLA claim, Plaintiff's infliction of emotional distress claim must be dismissed as well. Plaintiff contends that he suffered emotional distress a result of the failure by Constructors to reinstate him to his employment position after returning from medical leave. Assuming *arguendo* that Plaintiff did in fact suffer emotional distress, the claim is nevertheless non-cognizable if Constructors had the right to refrain from re-hiring Plaintiff. As indicated by the following binding Mississippi law, Constructors did operate within the bounds of its legal rights in choosing not to re-hire Plaintiff.

Mississippi is an "at will" employment state. Levens v. Campbell, 733 So.2d 753, 760 (Miss. 1999). "[A]bsent an employment contract expressly providing to the contrary, an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all. . . ." Id. (citations omitted). Therefore, if Plaintiff had no contractual right to ongoing employment, or if no law, such as the FMLA, required Constructors to reinstate Plaintiff, then Constructors was not obligated to re-hire Plaintiff. Plaintiff has come forward with no binding contract of employment between him and Constructors. Also, as analyzed above, Constructors was not required to

reinstate Plaintiff under the FMLA. The Court therefore finds that Constructors was not required to re-hire Plaintiff after he returned from medical leave. In that context, Plaintiff has failed to state a viable infliction of emotional distress claim based on the legally permissible decision by Constructors to refrain from reinstating him.

The Court further notes that under Mississippi law, "a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time." Lee v. Golden Triangle Planning & Dev. Dist., Inc., 797 So.2d 845, 851 (Miss. 2001) (citation omitted). Such a claim "will not ordinarily lie for mere employment disputes." Id. (citation omitted). The Court finds that the holdings in Lee provide an additional reason for dismissing the infliction of emotional distress claim. That is, Plaintiff cannot maintain an emotional distress claim based on the mere fact that his employment position was terminated. Under the facts of this case, Plaintiff's employment termination does not represent "deliberate, repeated harassment over a period of time." Summary Judgment on this issue must be granted.

IV. CONCLUSION

Based on the reasons set forth in this Opinion, Summary Judgment is granted herewith. In reaching this conclusion, the additional arguments presented in Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment were of no consequence. Accordingly, the Motion to Strike Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment should be denied as moot.

IT IS THEREFORE ORDERED that the Motion of Defendant for Summary Judgment [36-1] is hereby granted. A

Final Judgment dismissing this case with prejudice will be entered on this day,

IT IS FURTHER ORDERED that the Motion to Strike Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment [47-1] is hereby denied as moot

SO ORDERED this the [5th] day of April, 2004.

/s/ William Barbour
UNITED STATES DISTRICT JUDGE

tct

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LARRY G. BELLUM **PLAINTIFF**

VS. **CIVIL ACTION NO. 3:03-CV-343BN**

PCE CONSTRUCTORS, INC. **DEFENDANT**

FINAL JUDGMENT

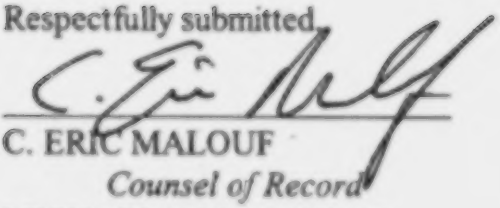
In accordance with the Opinion and Order entered on this day granting Defendant's Motion for Summary Judgment, this case is hereby finally dismissed with prejudice.

SO ORDERED this the [5th] day of April, 2004.

/s/ William Barbour
UNITED STATES DISTRICT JUDGE

tct

Respectfully submitted,



C. ERIC MALOUF
Counsel of Record
MICHAEL J. MALOUF, JR.
MALOUF & MALOUF
501 E. CAPITOL STREET
JACKSON, MS 39201
(601) 948-4320

Attorneys for Petitioner

Date: November 16, 2005

No. 05-640

DEC 16 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LARRY G. BELLUM,

Petitioner,

v.

PCE CONSTRUCTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARMIN J. MOELLER, JR.
Counsel of Record

BALCH & BINGHAM LLP
401 East Capitol Street
Suite 200
Jackson, Mississippi 39201
601-961-9900

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Court of Appeals Correctly Upheld Regulation 29 C.F.R. § 825.111(b) as It Directly Parallels the Stated Purpose of the Small Operations Exemption in the Family and Medical Leave Act.

II. Whether the Court of Appeals Correctly Upheld Regulation 29 C.F.R. § 825.111(b) Where the Statute is Silent on the Issue and the Regulation Is a Permissible Interpretation of the Statute.

PARTIES TO THE PROCEEDING

Petitioner

Larry G. Bellum
1647 David Allen Road
Greensburg, Louisiana 70441

Respondent

PCE Constructors, Inc.
Bob Robards, President and Owner
13544 Eads Road
Prairieville, Louisiana 70769

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

As Respondent argued in the district court, PCE Constructors Inc. ("PCE") is not a proper party under Rule 17 of the Federal Rules of Civil Procedure because it is not the successor to Constructors, Inc. which employed Petitioner during the relevant period. In their decisions, both the district court and the Fifth Circuit noted that they did not find it necessary to reach this issue in resolving the case in PCE's favor.

Respondent PCE Constructors, Inc. is actually Constructors, Inc. d/b/a PCE Constructors, Inc. in Mississippi. Constructors, Inc. is not and never has been the same entity as PCE Constructors, Inc., a Louisiana Corporation incorporated on January 15, 2002, and located at 13544 Eads Road, Prairieville, Louisiana 70769. PCE Constructors, Inc. has since reorganized as PCE Group, Inc.

The Fernwood, Mississippi location where Petitioner was employed is no longer owned by PCE Constructors, Inc.

No parent company or publicly held company owns, or has ever owned, 10% or more of the stock of respondent corporation Constructors, Inc. d/b/a PCE Constructors, Inc. in Mississippi or of any of the other entities listed here.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
Parties to the Proceeding	ii
Rule 29.6 Corporate Disclosure Statement	iii
Table of Contents	iv
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Relevant Provisions	1
Statement of the Case	2
Reasons for Denying the Petition	3
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) 3

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) 2, 4, 5, 8

Harbert v. Healthcare Services Group, Inc., 391 F.3d 1140 (10th Cir. 2004) 6

Humenny v. Genex Corp., Inc., 390 F.3d 901 (6th Cir. 2004) 1

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002) 5, 8

Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) 3, 5

REGULATIONS & STATUTES:

28 U.S.C. § 1254(1) 1

29 C.F.R. § 825.111(b) 1, 3, 9

29 U.S.C. § 2611(2)(B)(ii) 1, 2, 6, 9

OTHER AUTHORITIES:

Fed. R. Civ. P. 4 9

House Report No. 102-135(I) 6, 7

House Report No. 101-28(I) 7

OPINIONS BELOW

The United States District Court for the Southern District of Mississippi granted summary judgment to the Respondent, PCE Constructors, Inc. ("PCE"), as PCE is excluded from the Act's coverage pursuant to the Act's small operations exemption. The United States Court of Appeals for the Fifth Circuit affirmed, reported at *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005). The Fifth Circuit denied without opinion Bellum's petition for rehearing.

JURISDICTION

The Fifth Circuit's April 25, 2005 opinion renders this case reviewable pursuant to 28 U.S.C. § 1254(1). To the extent the Court upholds the regulation at issue, however, PCE remains excluded from the Act's coverage and the Court lacks subject matter jurisdiction to decide the Petitioner's claim.[1]

RELEVANT PROVISIONS

This appeal involves the meaning of the term "miles" as stated in 29 U.S.C. § 2611(2)(B)(ii) of the Family and Medical Leave Act of 1993, and the FMLA Regulation which defines the term as surface transportation miles, 29 C.F.R. § 825.111(b).

[1] "Where a plaintiff does not qualify as an 'eligible employee,' the court lacks jurisdiction to decide the FMLA claim." *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 904 (6th Cir. 2004).

STATEMENT OF THE CASE

The District Court and Fifth Circuit correctly determined that PCE's Fernwood and Baton Rouge worksites were more than 75 miles apart, and therefore, the aggregate number of employees within 75 miles of either worksite did not exceed 50. These determinations effectively removed PCE from the FMLA's coverage pursuant to the Act's small operations exemption, 29 U.S.C. § 2611(2)(B)(ii). The Plaintiff disputes the determinations of the lower courts, and asserts instead that the two worksites were less than 75 miles apart if the miles are measured using a linear or radius method, or "as the crow flies." However, the statute *as enacted* eliminates all references to a "radius" method of measuring the 75-mile distance. Furthermore, the accompanying regulation explicitly defines the distance as "surface miles, using surface transportation . . . " Although the Petitioner questions the validity of this regulation, the Fifth Circuit's *Chevron*[2] analysis clearly establishes that the regulation is a permissible and valid interpretation of the statute which must, therefore, be afforded deference. Lastly, this appeal presents an issue of first impression – no other district court or court of appeals has construed the term "miles" for purposes of the FMLA's small operations exemption. Even though the Petitioner opposes the Fifth Circuit opinion below, that opinion stands as the only opinion on point at this juncture. Therefore, this dispute does not present a fundamental issue or conflict necessitating review by this Honorable Court.

---

[2] *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

REASONS FOR DENYING THE PETITION

I. Regulation 29 C.F.R. § 825.111(b) and the Fifth Circuit's Decision Do Not Conflict with "the Clear Intent of Congress" as Asserted by Petitioner, Nor Do They Conflict With the Decisions of Other Courts

The petitioner contends that Congress' intent to use a radial method of measurement is "clearly expressed" throughout the legislative history of the Act, and that, accordingly, the District Court and Fifth Circuit should have struck down the FMLA regulation that defines "miles" as surface miles. Admittedly, certain Senate and House Reports refer to a 75-mile "radius," but Congress deleted these references from the FMLA *as enacted*. Pursuant to *Russello v. United States*, the references to "radius" lost all meaning upon their deletion by Congress, thereby permitting one to presume that the prior language was not intended to apply to the final version of the Act.[3] Since the references to "radius" no longer delimit the term "miles," Petitioner cannot justifiably assert that that the deleted references constitute "clear" Congressional intent.

In addition, after deleting from the Act all references to a 75-mile "radius," Congress refrained from clearly defining or otherwise expressing its intended method of measuring "miles." Therefore, Congress has not "directly

---

[3] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24, 104 S.Ct. 296, 301, 78 L.Ed.2d 17 (1983); *Arizona v. California*, 373 U.S. 546, 580-81, 83 S.Ct. 1468, 1487-88, 10 L.Ed.2d 542 (1963).

spoken to the precise question at issue" within the meaning of *Chevron*.[4] Rather, the statute "is silent or ambiguous with respect to the specific issue" in this case. Since the statute itself fails to express a "clear" Congressional intent to define the term "miles" as surface miles or as linear miles, it cannot be said that the regulation or the Fifth Circuit's decision conflict with "the clear intent of Congress" as alleged by Petitioner.

Lastly, neither the regulation nor the Fifth Circuit's decision conflict with other district courts or courts of appeals. The Fifth Circuit's analysis of the term "miles" as stated in the FMLA small operations exemption stands as the only authority on this precise issue. No district court has addressed the provision at issue, other than in dicta or other colloquial language,[5] and no other Circuit has analyzed the proper method of measuring "miles" in this regard. Therefore, no Circuit split exists at this time, and there is no emerging minority view to create a Circuit split. Accordingly, it cannot be said that another court would reach a different result on the same or similar facts.

II. The Fifth Circuit's *Chevron* Analysis Correctly Concluded That the Regulation is a Permissible and Valid Interpretation of the Statute

The Petitioner contends that the regulation is not a permissible construction of the FMLA under the second

---

[4] *See* Section II below for further discussion of the *Chevron* doctrine.

[5] For example, on pages 11-13 of his Petition, Petitioner references 26 cases that mention a "75-mile radius," but *none* of the cases address the issue of how miles should be measured for the application of the small operations exemption.

prong of *Chevron*,[6] which applies when Congress has left an explicit or implicit gap in the statutory language or when "the statute is silent or ambiguous with respect to the specific issue." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Under the second prong of the analysis, the court must simply determine "whether the agency's answer is based on a permissible construction of the statute," and in doing so, the court must consider only whether the regulation is arbitrary, capricious, or manifestly contrary to the statute. *Id.*

In the case at bar, the statute fails to define the intended method of measuring "miles," and pursuant to *Russello*, the historical references to a 75-mile "radius" lost all meaning when Congress eliminated said references from the Act. Since the statute is "silent or ambiguous" as the proper measurement of "miles," the Fifth Circuit analyzed the accompanying regulation under the *Chevron* doctrine and concluded the Secretary's construction of the FMLA provision is a *permissible* interpretation of the statute based upon the stated purpose of the small operations exemption.

Congress included in the FMLA a small employer exemption that excludes from coverage any employer with less than fifty (50) employees, but separately provided an

---

[6] The Petitioner also contends that the Secretary of Labor exceeded his authority by altering the coverage of FMLA leave. In doing so, Petitioner erroneously leads the Court to believe that this regulation has a similar effect to the regulation at issue in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002), which imposed certain notice requirements not required by statute. The Fifth Circuit disposed of this contention in footnote 6 of its decision.

exclusion for small operations – i.e., "a potentially large company with a relatively small satellite office in a particular area." *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1148 (10th Cir. 2004).[7] The specific purpose of this separate exclusion for small operations was to recognize and accommodate the difficulties and concerns employers face in reassigning workers to geographically separate facilities. *Id.*, *quoting* H.R. Rep. No. 102-135(I) at 37 (1991). The Tenth Circuit opined in *Harbert* that in enacting the small operations exemption, Congress "determined that if any employer (large or small) has no significant pool of employees *nearby* to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee."[8] *Id.* at 1149 (*emphasis in original*).

This purpose clearly focuses on reassigning employees to geographically separate facilities during another employee's FMLA leave (twelve weeks maximum). A *temporary* reassignment of this nature inevitably requires transporting the replacement employee to and from the geographically separate facility. The regulation defining "miles" as "surface miles, using surface transportation"

---

[7] In this case, the Tenth Circuit reviewed the agency's interpretation of the term "worksite" where Congress failed to define the term. Though the terms "worksite" and "miles" both appear in 29 U.S.C. § 2611(2)(B)(ii), the small operations exemption, the Tenth Circuit did not analyze the method of measuring "miles." The court did, however, discuss at length the stated purpose of the exemption.

[8] This is precisely the situation in the case at bar. PCE did not have a significant pool of employees nearby who could have traveled less than 75 miles *by surface transportation* to cover for Mr. Bellum during his FMLA leave. The Fifth Circuit recognized this practical problem as precisely the difficulty that Congress intended to accommodate for employers.

thus *reasonably contemplates* the inevitable consequences of an employee's temporary reassignment to cover for another employee on FMLA leave. Therefore, one cannot justifiably contend that the regulation at issue is arbitrary, capricious or manifestly contrary to the FMLA when considered in conjunction with the stated purpose of the small operations exemption.[9] Accordingly, the Fifth Circuit correctly concluded that the regulation is at least a *permissible* interpretation of the statute, a regulation which is entitled to deference.

The more general purpose of the exemption is to relieve small employers from the burdens imposed by the FMLA. Congress explains:

> [The Act] covers only employers with fifty or more employees. The exemption of employers with less than fifty employees means that 95% of all employers are excluded from the coverage of the bill. . . . While concerned about the low coverage figures, the Committee, *in recognition of the particular problems faced by small employers*, approved this provision which exempts the small employer while providing coverage for workers employed by medium and large sized companies.

House Report No. 102-135(I), June 27, 1991, page 37 (emphasis added). *See also* House Report No. 101-28(I),

---

[9] The Petitioner's only arguments for striking this regulation are (1) the term "radius" can be found in Senate and House reports; and (2) the term "radius" can be found in numerous court opinions. However, the term "radius" is not located in the Act itself, and all courts that have used the term "radius" when citing the statute have done so colloquially or in mere dicta. None of the cited opinions analyzed the proper method of measuring "miles" or actually applied a 75-mile "radius" under the FMLA exemptions.

April 13, 1989, page 24. Congress clearly contemplated and accepted the scope of the exemption granted to employers such as PCE who employ less than 50 employees within 75 miles. Congress firmly delineated the exemption at 50 employees, thereby declaring that any employer with less than 50 employees within 75 miles of the worksite shall not be burdened by the requirements of the FMLA. PCE did not employ 50 employees within 75 miles of Mr. Bellum's worksite. Thus, PCE exemplifies the small operation that Congress specifically intended to exclude from the burdens of the FMLA.

III. The Fifth Circuit Opinion is Reasonable and Does Not Fail to Apply Existing Law

Petitioner contends that *Ragsdale*, see supra note 5, requires agencies to "respect the compromises made by Congress," and that Congress compromised on the number of employees required for and the geographic limitation on the small employer exemption. While this may be true, neither party contends that the number of employees (50) or the number of miles in the exemption (75) should be or has been modified. The only issue at this juncture is the definition of the term "miles." Petitioner contends that "Congress clearly chose 'radius' as the method to measure distance within 75 miles," but, to the contrary, Congress clearly *eliminated* all references to a 75-mile "radius" for purposes of the small operations exemption. Obviously, Congress did not want to delimit the geographical distance with that qualifier. The Fifth Circuit properly conducted a *Chevron* analysis which primarily focused on the stated purpose of the small operations exemption. This reasoning is not flawed.

In addition, the Petitioner argues that the regulation lacks the "uniformity and simplicity" of Federal Rule of Civil Procedure 4, which uses a "radius" method to measure distance. However, the purpose of the small operations exemption is not merely "uniformity and simplicity"; the specific purpose of this exemption, separate and apart from all others, is to alleviate the difficulties faced by employers when reassigning employees to geographically distinct facilities. Therefore, the Petitioner's reliance on Rule 4 is unfounded.

Lastly, Petitioner contends that the Fifth Circuit failed to apply existing law. Though Petitioner cites twenty-six cases in which the term "radius" can be found, see supra note 4, Petitioner simultaneously acknowledges that no court has determined this issue. Those references to "radius" are nothing more than dicta. The Fifth Circuit clearly did not fail to apply existing law, for there is no existing law to be applied.

IV. The Issue Presented on Appeal Does Not Constitute an Issue of National Importance

There exists no Circuit split on this particular issue, and there is no emerging minority view to create a Circuit split. The Fifth Circuit is the only Circuit that has opined on the definition of "miles" in 29 U.S.C. § 2611(2)(B)(ii) and on the validity of 29 C.F.R. § 825.111(b). If Congress deems the Fifth Circuit opinion an unwarranted interpretation of the statute or the regulation, it can easily amend the statute to express its intended method of measuring miles. This response is unlikely however, considering that the regulation defining "miles" as surface miles has existed since 1995 without further comment or

action from Congress. Since remedies short of judicial review are available to settle a Circuit split should one arise, it is not necessary to grant a Writ of Certiorari.

CONCLUSION

The FMLA is silent as the proper method of measuring "miles" as stated in the Act's small operations exemption, and historical references to a 75-mile "radius" lost all significance when Congress deleted the term from the final version of the Act. The accompanying regulation that defines "miles" as "surface miles, using surface transportation" directly parallels the stated purpose of the FMLA's small operations exemption – namely, to reassign employees to geographically separate facilities while another employee takes FMLA leave. Therefore, the regulation is not arbitrary, capricious or manifestly contrary to the statute. Accordingly, the Fifth Circuit's decision upholding the regulation as a permissible interpretation of the statute should be affirmed, particularly since no other district court or court of appeals has rendered a contrary decision. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ARMIN J. MOELLER, JR.
Counsel of Record
BALCH & BINGHAM LLP
401 East Capitol Street
Suite 200
Jackson, MS 39201
601-961-9900

Attorneys for Respondent

Date: December 16, 2005